Buyer's Hardship Precludes Specific Performance

In *Evans v Robcorp Pty Ltd* [2014] QSC 26, Peter Lyons J was faced with an application for summary judgment under s 70 of the *Property Law Act 1974* (Qld). The case is noteworthy for its consideration of the relevance of circumstances arising after formation of the contract of sale in a summary judgment context.

The applicant was the seller under a contract of sale of land. The respondents were the buyer under the contract and a guarantor of the buyers' contractual obligations. Following the buyer's failure to settle, the seller made application for an order that the contract be performed within 14 days. The application was resisted on grounds relating to the impecuniosity of the buyer with reference also being made to the financial position of the guarantor.

Evidence was led that funds for the funds had failed to materialise from other development projects and that the buyer was not 'worth anything at all.' Attempts to enter contracts to resell the land had proven fruitless along with attempts to raise funds by means of a prospectus. The guarantor deposed to not having any assets and being with financial obligations to support five children.

A critical issue for determination by Lyons J was the relevance of a buyer's impecuniosity arising after the date of the contract. For the applicant, it was submitted that specific performance should not be refused where the buyer's impecuniosity has arisen subsequent to a contract. Support for this submission was provided by *Nicholas v Ingram* [1958] NZLR 972 and *Ready Construction Pty Ltd v Jenno* [1984] 2 Qd R 78. These authorities suggested that for hardship to operate as a defence to an action for specific performance, the hardship must generally have been in existence at the time of the contract rather than a change of circumstances arising thereafter.

In reaching his final determination, Peter Lyons J referred with approval to various passages from the eighth edition of Spry *Equitable Remedies*. In this regard, it was noted by Spry that courts will not require that to be done which cannot be done. Further, Spry considered it to be the preferable view that courts of equity will ordinarily be concerned with the possibility of performance as at the date at which the proposed order is to operate.

Lyons J noted that Spry dealt separately with the question of hardship:

> At pp 202-203 he expressed the view the decision in *Nicholas* is wrong. He said that courts of equity must take account of all circumstances known to exist at the time when an order is made, as well as circumstances likely to occur subsequently, when called on to decide whether the effect of the order for specific performance will be to cause disproportionate hardship so as to give rise to injustice; and that there is no reason in principle why a source of hardship should be ignored merely because it did not exist at the time when the contract was entered into: pp 203-204. (at [15])

Accepting the views expressed by Spry to be correct, Lyons J was satisfied that the evidence presented to the effect that the buyer lacked the financial capacity to settle was sufficient to demonstrate that summary judgment should be refused.

Notwithstanding contrary earlier authorities, the decision reached, seems, with respect, to be eminently sensible.

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